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BRIEF

IN RE

H. R. Bills Nos. 1478, 6153, and the Petition of the Citizens of Bear Lake County, Idaho Territory.

I.

The legislative assembly of Idaho territory, during the session of 1884–5, passed "An act to provide for holding elections and prescribing the qualifications of electors, and for other purposes," which was approved Feb. 3, 1885.

The second section of this act is as follows:

"SEC. 2. No person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery, in this territory, or in any other state or territory in the Union, unless restored to civil rights, nor any person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, or counsels, or encourages its members or devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a right or ceremony of such order, organization or association, or otherwise, shall be permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory."

To enforce the provisions of this section the following test oath was prescribed; any person who could not take the same, or declined so to do, was thereby disfranchised:

"SEC. 16. If any person offering to vote shall be challenged by any judge or clerk of the election, or any other person entitled to vote at the same poll, and either judge shall challenge any person offering to vote whom he shall know or suspect not to be qualified, one of the judges shall declare to the person so challenged the qualifications of an elector; if such person shall

then declare himself duly qualified, and the challenge be not withdrawn, one of the judges shall then tender him the following oath:

"You do solemnly swear (or affirm) that you are a male citizen of the United States, over the age of twenty-one years; that you have actually resided in this territory for four months last past, and in this county thirty days; that you are not a bigamist or polygamist; that you are not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that you do not, either publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that you regard the constitution of the United States and the laws thereof, and of this territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding, and that you have not voted at this election. So help you God!"

The forty-third section of the same act makes it perjury for any one to falsely take the foregoing oath.

The same legislative assembly passed "An act to fix the amount of the official bonds of certain county and precinct officers and to prescribe official oaths of officers," which was approved Dec. 23, 1884. Section 3 of this act requires all such officers to take the following oath:

"I do solemnly swear that I am a male citizen of the United States, over the age of twenty-one years; that I have actually resided in this territory for four months last past, and in this county thirty days before my election or appointment; that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not, either publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I regard the constitution of the United States and the laws thereof, and of this territory, as interpreted by the courts, as the supreme law of the land, the teachings of any order, organization, or association to the contrary notwithstanding. So help me God!"

The laws of Idaho territory require jurors to have the qualifi-

cations of electors, and persons summoned as jurors, who by reason of the aforesaid enactments are disfranchised, are also disqualified for jury duty.

The result is that more than three thousand citizens of the United States and of the territory of Idaho are disfranchised as electors, disqualified as office-holders, and prohibited from serving as jurors. In several counties in the territory the population is largely of those who are adherents of the Mormon Church. In Bear Lake county almost all the inhabitants are of that religious faith. The petition of 783 of the residents of that county who are monogamists, and yet Mormons, has been presented to the House of Representatives and referred to this committee. It sets forth in plain unvarnished language the condition to which the affairs of that county have been reduced by this extraordinary legislation, and shows the monstrous injustice of disfranchising and disqualifying, in this wholesale manner, a whole body of people who are absolutely without offence against any law. The legislative enactments, by which this has been done, are clearly forbidden by the constitution of the United States.

These persons who are thus wantonly disfranchised are citizens of the United States and of Idaho territory. They are honest, sober, moral, law-abiding, industrious, and useful citizens. They have reclaimed a desert land and made it to blossom like the rose. Their only offence is their religion. They are proscribed solely for their faith. A whole county is, in consequence of these unconstitutional enactments of the territorial assembly, wholly without law, and the people without power to choose a single officer, and without the means of protecting themselves against the lawless who come among them. The courts are paralyzed.

II.

House Bills 1478 and 6153 propose to extend the unconstitutional provisions of these monstrous Idaho laws to all the territories of the United States. Their introduction in the House of Representatives was procured by federal officials and other designing and unscrupulous men in Utah and Idaho who came hither for the purpose and who have been aided and abetted by parties here and elsewhere who expect to profit thereby. The avowed purpose is to disfranchise all the adherents of the Mormon Church

in Utah territory and turn over the government of that great and prosperous community to a factious minority which comprises less than one-twentieth of the inhabitants thereof. Save in three and possibly four counties of that territory there would be scarcely a sufficient number of qualified voters remaining, after all Mormons were disfranchised, to fill the offices. The affairs of the territory, with its assessed property aggregating many millions of dollars, would be handed over to an adventurous class who, outside a few localities, have no interest whatever in the welfare of the community. Instead of one county like Bear Lake, in Idaho, being without autonomy, without officers, without protection for life and property, there would be not less than twenty in that condition in Utah.

The Idaho legislation makes *belief* an offence for which electors can be disqualified, and the House Bills propose to do the same. In this respect the territorial legislation, and this proposed congressional legislation, goes far beyond the act of Congress of March 22, 1882, commonly known as the Edmunds law. That expressly provides that any person otherwise elligible to vote shall not be excluded from the polls on account of *any opinion* such person may entertain on the subject of bigamy or polygamy.

The Edmunds law disqualifies bigamists or polygamists, and persons who offend by unlawful cohabitation. These bills propose to disqualify all members of "a sect or organization of people who denominate themselves the Church of Jesus Christ of Latter-day Saints, or Mormons."

This is equivalent to prescribing a religious test as a qualification for electors and for holding an office or public trust. The constitution of the United States declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Moreover mere opinions, beliefs, thoughts, desires, are beyond the control of human agencies. They may be altogether wicked and, as the old indictments ran, "instigated by the devil," but unless manifested by overt acts, cognizance thereof must be relegated to "the Searcher of all hearts." The time was when men might be punished for "harboring evil designs against the state," and helpless old women could be condemned, hung, or burned for the exercise of "an evil eye." The rack and the boot and "the

water test," supplied the necessary evidence if there was lack of swearing by delators, or common repute was deemed insufficient.

It is a fact beyond dispute—established by official statistics—that less than one-twentieth of the Mormons have practised polygamy, and the Utah commissioners report that "few, if any," now enter into the forbidden relations. And yet it is proposed to deprive the vast majority—more that nineteen-twentieths—who have in nowise offended, of one of the highest and dearest rights of citizenship!

III.

There are some rights the Congress of the United States cannot lawfully touch even if they are not "nominated in the bond." The right of community self-government lies at the very foundation of our government. It is a birthright which Saxon, Teuton, and Celt have never ceased and will never cease to contend for. Tacitus marked it as the distinguishing feature of the government of the fierce, liberty-loving races of northern Europe, and from his day to ours no people have been able to preserve their liberties who failed to recognize, cherish, and maintain it as the vital principle of free institutions.

Does any one doubt that the people of the thirteen colonies did not include among their "certain unalienable rights" this one of community self-government? Without it the Declaration of Independence would have been meaningless. If there is "a right inestimable" to the people "and formidable to tyrants only" it is that one which secures to them the management and control of their local affairs. What were among the chief causes assigned by our patriot forefathers in justification of the colonies separating from the mother country? "For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the powers of our government. For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

Will the Congress of the United States undertake to do what the British Parliament could not do without violating the prescriptive rights of freeborn English subjects? Will it assert that its power over the people of a territory is greater than that of the Parliament of England over its colonies? Will it attempt to evade

constitutional limitations, and ignore positive prohibitions by the contemptible and paltry pretexts upon which this proposed legislation is sought to be justified?

The elective franchise, the right of suffrage, is the highest privilege of citizenship. Alexander Hamilton declared that—

"A share in the sovereignty of the state which is exercised by the citizen at large in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property. Such a doctrine would ill-suit the principles of the revolution which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to a share in the government. Let me caution against precedents which may in their consequences render our title to this great privilege precarious."

Mr. Justice Washington in *Corfield* v. *Coryell*, (4 Washington, 371,) in speaking of the privileges belonging "to citizens of all free countries" enumerates "the elective franchise." Mr. Justice Miller in delivering the opinion of the Supreme Court of the United States in *Crandell* v. *The State of Nevada*, (6 Wall., 36,) held that citizens of the United States were entitled "to seek its protection, to share its offices, to engage in administering its functions."

The Supreme Court unanimously held in *Dred Scott* v. *Sanford*, (19 Howard, 393,) that—

"The United States, under the present constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a state, and may govern it as a territory until it has a population which, in the judgment of Congress, entitles it to be admitted as a state of the Union. During the time it remains a territory, Congress may legislate over it *within* the scope of its constitutional powers in relation to citizens of the United States and may establish a territorial government, and the form of this local government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the constitution, is authorized to exercise over citizens of the United States in respect to their rights of person, or rights of property. The territory thus acquired is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the federal government. Congress can exercise no power over the rights of persons or property of a citizen in the territory which is prohibited by the constitution."

Judge Black, in discussing proposed legislation by Congress, analogous to this you are asked to recommend said—

"It is true, also, that the general government may give the colonists a charter, and call it an act of incorporation or an organic act. This was what the imperial government of England did for the several colonies that settled on its lands in America. But the charter must be a free one. If it abridges the liberty of the people to do as they please about matters which concern nobody else, it is void. Even if the colonists could consent, for a consideration, to accept an organic act imposing restraint upon their right of self-government, they could throw it off as a nullity; for the birthright of a freeman is inalienable. I need not say that foreigners naturalized are on a level with native citizens.

"As Congress cannot give, so it cannot withhold the blessing of popular government in a territory. But the legislation now proposed in addition to that already passed would blacken the character of the federal government with an act of cruel perfidy. The charter you gave to Utah was in full accordance with the broad principle of American liberty. You organized for them a free territorial government, put into their hands all the machinery that was needed to carry it on; the ballot to be used under regulations of their own; officers chosen by themselves to administer their local affairs, collect the taxes and take charge of their money, and a legislature representing them—responsible to them—clothed with exclusive power to make their laws, and to alter them from time to time as experience might show to be just and expedient. Gilding your invitation with this offer of free government, you attracted people from every state and from all parts of the civilized world, whose industry scattered plenty over that barren region and made the desert bloom like a garden. Now you are urged to break treacherously in upon their security; supersede the laws which they approve by others which are odious to them; make their legislation a mockery by declaring that yours is exclusive; drive out the officers in whom they confide, and fill their places with raging and rapacious enemies; take away their right of suffrage, and with it all chance of peaceable redress; break down the whole structure of the territorial government, under which you promised to give them a permanent shelter. Would not this be a case of punic faith? Apart from all question of constitutional morality, the conduct of the wrecker who burns false lights to mislead the vessel he wishes to plunder does not seem to me more perfidious."

IV.

The XIV amendment to the constitution made "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," citizens of the same, "and of the state wherein they reside." It forbade the abridgment of the "privileges or immunities of citizens of the United States" by the states, and prohibited any state depriving "any person of life, liberty, or property, without due process of law." That which is forbade

the states in respect to the personal or civil rights of the citizen is equally prohibited to the federal power.

The elective franchise, the right to hold office, to engage in administering the functions of the government, is a privilege of the citizens of the United States.* They cannot be deprived of this right "without due process of law." What is "due process of law?" The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words, (2 Inst., 50,) says they mean "due process of law." *Den* v. *Murray*, (18 Howard, 272.) "'By the law of the land,' or 'due process of law,' does not," says Mr. Justice Curtis, "mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property without a trial." (*Green* v. *Briggs*, 1 Curtis, 311.)

The power of Congress is limited by "certain vital principles in our free republican government," as well as by the plain letter of the constitution. Chief-Justice Marshall, in *Fletcher* v. *Peck*, (6 Cranch, 87,) says:

"It may well be doubted whether the nature of society and of government does not prescribe some limit to legislative power."

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be sacred." (*Wilkinson* v. *Leland*, 2 Peters, 654.)

"Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice inherent in the nature and spirit of the social contract, (in this country at least,) the character and genius of our governments, the causes from which they spring, and the purposes for which they were established, that rises above the restraints and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its lawful authority." (*Regents of Md.* v. *Williams*, 9 Gill & Johnson, 365.)

"There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power: as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof the government was established." (*Calder* v. *Bull*, 3 Dallas, 386.)

"But in this country the weight of authority will be found in favor of the

*Carfield *v.* Coryell, 4 Washington, 371. Crandall *v.* State of Nevada, 6 Wallace, 36. Alexander Hamilton.—Phocion's Pamphlets.

doctrine that governments are not clothed with absolute power, but that, independently of written constitutions, there are restrictions upon the legislative power, growing out of the nature of the civil compact and the natural rights of man; and that when certain boundaries are over-leaped, and a law passed subversive of the great principles of republican liberty and natural justice—as for instance, taking away without cause the liberty of the citizen—that it would become the imperative duty of the courts to pronounce such a statute inoperative." (*Campbell* v. *The State of Georgia*, 11 Ga., 353.)

"What the legislature cannot do directly it cannot do by indirection. If it has no power expressly to take away the right, it has none to define it away, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial." (*Monroe* et al. v. *Collins*, 17 Ohio, 665.)

"Laws must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure rather than to subvert or impede the exercise of the right to vote." (12 Pickering, 488.)

V.

The Supreme Court of the United States, and the highest courts of all the states, where the question has been adjudicated, have held that the citizen cannot be disfranchised save for crime, and then only by "due process of law," which Mr. Justice Curtis says "necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it is proved."

The case of *Cummings* v. *The State of Missouri*, (4 Wall.,) is directly in point. Therein the whole subject of the disfranchisement and disqualification of the citizen is carefully considered, and the law laid down by the Supreme Court of the United States was in exact conformity to the doctrine held by the greatest jurists who have presided over the courts of last resort in many of the states of the Union.

The constitution of the state of Missouri, made in 1865, disfranchised and disqualified all persons who could not swear to certain things, including therein their *sympathies* and *desires*—matters of mental operation independent of acts and deeds. A Reverend Mr. Cummings, a priest of the Catholic Church who refused to take this prescribed oath and persisted in ministering the offices of his sacred profession, was prosecuted and convicted in one of the circuit courts of the state, and the judgment being affirmed on appeal by the supreme court of the state the case came before the Supreme Court of the United States on writ of error. It is one

of the great cases wherein the highest judicial tribunal of the land has fixed the metes and bounds of legislative power, and determined the rights of citizens. In connection with *ex parte Garland*, passed upon at the same time by the court, the whole subject of test oaths is very elaborately and most luminously considered.

The important question settled by the Supreme Court in these cases, which is involved in the bill now before the committee, is that a test oath of the description embodied therein is in the nature of a bill of attainder. Mr. Justice Field in the opinion of the court says:

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the constitution bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party without any of the forms or safeguards of trial; it determines the sufficiency of proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence."

"These bills," says Justice Field, "are generally directed against individuals by name; but they may be directed against a whole class. The bill against the the Earl of Kildare and others, passed in the reign of Henry VIII, enacted that 'all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said' late Earl, and certain other parties who were named, 'in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged, and convicted of high treason;' and that 'the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act.'

"These bills may inflict punishment absolutely, or may inflict it conditionally.

"The bill against the Earl of Clarendon passed in the reign of Charles the Second, enacted that the Earl should suffer perpetual exile, and be forever banished from the realm; and if he returned or was found in England, or in any other of the King's dominions after the first of February, 1667, he should suffer the pains and penalties of treason; with the proviso, however, that if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect."

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" The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty! They call upon the parties to establish their innocence, and they declare that such innocence can be shown only in one way, by an inquisition in the form of an expurgatory oath, into the conscience of the parties."

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" The provision of the federal constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the constitution intended to guard which may not be effected." (4 Wall., 277.)

VII.

The decisions of the state courts are equally clear and emphatic. The act of Congress of March 3, 1865, prescribed, as an additional penalty for the crime of desertion from the military or naval service of the United States, forfeiture of citizenship and incapacity to hold any office of trust or profit under the United States, or to exercise any rights of citizens thereof. Reily, a citizen of Franklin county, Penna., was drafted and evaded service, and was thereupon registered as a deserter by the provost marshal as the law required. Otherwise he was a qualified voter under the laws of Pennsylvania. His vote was rejected by the election officers on the ground that he was disqualified under the act of Congress of March 3, 1865. Thereupon he began action against Huber, one of the election officers, and upon an agreed statement of facts the court below awarded judgment for plaintiff. The case was made up for decision thereon by the supreme court of the state.

Judge Strong, subsequently one of the justices of the Supreme Court of the United States, delivered the opinion of the court. It was held that inasmuch as Reily had not been convicted by any court of the crime of desertion he was a qualified voter. The language of the court is as follows:

" The fifth article of the amendments to the constitution ordains 'that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of

war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.'

"The sixth article secures to the accused in all criminal prosecutions certain rights, among which are a speedy trial by a jury of the vicinage, information of the nature and cause of the accusation, face to face presence of witnesses, and the assistance of counsel. The spirit of these constitutional provisions is, briefly, that no person can be made to suffer for a criminal offence unless the penalty be inflicted by due process of law. What that is has been often defined, but never better than it was, both historically and critically, by Judge Curtis, of the Supreme Court of the United States, in *Den* v. *Murray et al.*, (18 Howard, 272.) It originally implies and includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. It must be admitted there are a few exceptional cases. Prominent among these are summary proceedings to recover debts due to the government, especially taxes and sums due by defaulting officers. But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties can be in any other mode than by trial according to the law of the land or due process of law; that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt of an alleged violator of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of that phrase in the constitution. There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his right, is an inquiry of a different character. Neither our constitution nor our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal. Even if they were to assume jurisdiction of the offence described in the act of Congress, and proceed to try whether the applicant for a vote had been duly enrolled and drafted, whether he had received notice of the draft, whether he had deserted and failed to return to service, or failed to report to a provost marshal, and whether he had justifying reasons for such failure, and if after such trial they were to decide that he had not forfeited his citizenship all this would not amount to an acquittal. It would not protect him against a subsequent similar accusation and trial; would not protect him against trial and punishment by a court martial. Surely that is no

trial by due process of law the judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law. Moreover it is not in the power of Congress to confer upon such a tribunal, which is exclusively of state creation, jurisdiction to try offences against the United States." (*Huber* v. *Reily*, 3, P. F. Smith, 112.)

The same broad principle was laid down by the supreme court of New York in the case of *Gotcheus* v. *Matheson*, (58 Barbour, 152.)

The plaintiff having been deprived of his vote by the inspectors of election in district No. 2 of the town of Triangle, in Broome county, New York, brought action against the same for damages. The inspectors set up as a defence the act of Congress of March 3, 1865, and averred that, believing the plaintiff to be a deserter, they, upon the proper challenge being made to his vote, administered to him the oath prescribed in case of challenge, whereupon he refusing to answer all questions touching his being a deserter his vote was rejected. The defence was demurred to by plaintiff on the ground that it did not constitute a defence, and judgment of court was given. Justice Murray in his opinion says:

"If it was the intention of Congress, by this act, without a trial, or the adjudication of any court, to deprive this class of persons of citizenship, it would come under that class of legislation designated as bills of attainder."

"Citizenship of the United States is an important right, and the privileges conferred by it are important privileges, dearly prized by the American people. An act that provides for a forfeiture thereof imposes a penalty, and comes within the provisions of the constitution in regard to bills of attainder."

Election officers cannot be made the proper tribunal for determining the guilt or innocence of accused persons:

"The inspectors of election are not in a position to adjudicate these matters. They are not authorized to do so. They can determine who are citizens, but they cannot adjudge and declare, as an original adjudication, that the plaintiff's citizenship has been forfeited by the commission of an offence. They could receive as evidence such an adjudication made by another court, and give effect to its provisions by rejecting the vote, and thus deprive the person of the privilege of citizenship, but further than this I do not see that they could go." (*Gotcheus* v. *Matheson*, 58 Barbour, 152.)

It has been uniformly held, both in England and in this country, that an election officer is "neither a judge nor anything like a judge." (*Ashby* v. *White*, 2 Ld. Roym, 938. *Jenkins* v. *Waldron*, 11 Johns, 114. *The People* v. *Pease*, 30 Barbour, 588.)

In the matter of Dorsey, (7 Porter, 293,) the supreme court of Alabama held that a trial and conviction was necessary before a citizen could be disfranchised.

A statute of Alabama disqualified persons who had engaged in duels, and prescribed a test oath. Mr. J. L. Dorsey declining to take this oath was refused admission to the bar, and the case coming up to the supreme court of that state was elaborately considered in all its bearings.

In the course of the opinion, the court says:

"The tenth section of the bill of rights, among other things, provides that no one shall be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or happiness, but by due course of law. After a patient and mature examination of the matter, I am of opinion that the requisition of the expurgatory oath exacted by this law offends against this portion of the bill of rights. It is so offensive to the first principles of justice to require a man to give evidence against himself in a penal case that, independent of the constitutional interdict no one in this enlightened age will be found to advocate the principle. But it may be said, this is not a case of this kind, as no corporal or pecuniary punishment is the consequence of a refusal to take the oath against duelling. But are not the results the same whether punishment follows from the admission or is imposed as a consequence of silence? Can ingenuity make a distinction between a punishment inflicted in this mode, as a consequence of the refusal to take the oath, by closing one of the avenues to wealth and fame, and a positive pecuniary mulct? If there be a difference, I think it entirely in favor of the latter so far as the amount or weight of the penalty could affect the decision of this question."

Justice Goldthwaite in the same case said:

"I have no hesitation in declaring that this act provides a mode of ascertaining and punishing guilt which is not only unwarranted by the constitution but is also in direct contravention of several of the most important provisions of the declaration of rights, by which the liberties and privileges of the citizen are guarded."

The supreme court of Kentucky in *Gaines* v. *Buford*, (1 Dana, 510,) wherein was involved the constitutionality of an act of the legislature forfeiting titles to public lands unless improvements thereon were made within a given time, said—

"That the term (bills of attainder) should be received in the large sense thus given to it is consonant with the true republican character of our institutions. A condemnatory act of the legislature inflicting upon an individual, or class of individuals, pains and penalties is as much within the reason of the prohibition as if it inflicted capital punishment. They are both equally hostile to

the principles of civil liberty and the spirit of our written constitutions. They are equally engines of tyranny and oppression, and equally unsuited to the government of a free people."

"Understanding, then, the term, bills of attainder, as embracing bills of pains and penalties, the act in question would seem to fall under this inhibition. That it is a highly penal law, inflicting a most grievous penalty for the omission of the thing commanded to be done, is beyond dispute. But it is not the weight of the penalty, nor the character of the offence, that makes it a bill of attainder. But it is the confiscation of the property of individuals which it attempts to make before any condemnation, and without any condemnation, for the offence designated, either in *personam* or in *rem*. When the state rightfully acquires the property of a citizen by forfeiture, it is, as the punishment annexed by law, to some illegal act or negligence of its owner. That the legislature may make the act or omission illegal, and prescribe forfeiture as the penalty, is admitted. But it is denied that it can of itself inflict the punishment. So far as the act in question undertakes to divest the title out of Gaines and vest it in the state, it is a legislative infliction of the penalty, it is an assumption to that extent of judicial magistracy without affording the accused the benefit of those forms and guards of trial which are his constitutional right whenever he is sought to be punished either in his person or by forfeiture of his property for alleged violations of the penal enactions of the state."

* * * * * * * * *

"Bills of attainder have generally designated their victims by name: but they may do it also by classes, or by general description fitting a multitude of persons. Either mode is equally liable to moral and constitutional censure. They have generally been applied to punish offences already committed; but they have been, and may be, applied to the punishment of those thereafter to be committed, or for criminal omissions thereafter incurring.

"A British act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury; the prisoner when brought to the bar, being merely asked what he has to allege why execution should not be awarded against him."

VII.

The court of appeals of New York in *Barker* v. *The People*, (3 Cowen, 686,) held the same doctrine which Mr. Justice Miller enunciated in *Crandall* v. *The State of Nevada*, (6 Wall., 36,) to wit, that "to share its offices, to engage in administering its functions," is among the rights of the citizens of the United States. The Court of Appeals held that—

"Eligibility to office is not declared as a right or principle by any express terms of the constitution; but it results, as a just deduction, from the express powers and provisions of the system. The basis of the principle is the absolute liberty of electors and the appointing authorities to choose and appoint any person who is not made ineligible by the constitution. Eligibility to office, therefore, belongs not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect should be ineligible to public trusts; or that all persons not possessing a certain amount of property should be excluded; or that a member of the assembly must be a freeholder; any such regulation would be an infringement of the constitution, and it would be so because, should it prevail, it would be, in effect, an alteration of the constitution itself."

"As a right flowing from the constitution, it cannot be taken away by any law declaring that classes of men, or even a single person not convicted of a public offence, shall be ineligible to public station; but as a right not expressly secured by the constitution it may be taken from convicted criminals when the legislature in their plenary power over crimes deem such a deprivation a necessary punishment. To say this is to say, in substance, that the right in question may be forfeited by crimes when the legislature so direct." (*Barker* v. *The People*, 3 Cowen, 686.)

Alexander Hamilton never rendered a greater service to the cause of human liberty, good government, and equal justice than he did in opposing the proposition to disfranchise all persons who had voluntarily remained in parts of the state of New York in occupation of the British troops. I would commend his example to you as the bravest and noblest act of his great and heroic life. He was just entering upon his career as a professional and public man. It was at a time when a triumphant populace that had suffered much in person and in property at the hands of a foreign foe was determined to wreak vengeance on all who had not been their friends. It was as much as a man's life was worth to lift his voice against any proposition in behalf of the despised and hated loyalists. It was enough to deprive any man of the favor of the whole community in which he lived to oppose any measure, no matter how monstrous, which was intended to deprive loyalists of their rights of person or of property. But Hamilton never knew what the feeling of fear was. He never shrank from the performance of a duty because it might be dangerous to his personal

safety, or might endanger his popularity for the time being. If the cause was just he would seek the opportunity to champion it as he did in this instance. His two pamphlets on the proposition to disfranchise those who had simply continued to reside within the lines of the enemy ought to be read by all who admire genius, esteem courage, and venerate bold, true champions of justice and right.

I will only quote the following passage:

"Nothing is more common than for a free people in times of heat and violence to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of *disfranchisement*, *disqualification*, and *punishments* by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens, at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious without *hearing* or *trial*, no man can be safe nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense."

VIII.

The laws enacted by the legislative assembly of Idaho, and the legislation you are asked to recommend, are clearly violative of the sound principles laid down by the great jurists quoted from. Acts of the legislature which disfranchise classes for *beliefs* and *opinions*, and prescribe that election officers shall determine whether the proscribed persons are guilty thereof by applying a test oath, are undoubtedly bills of pains and penalties such as are described in the decisions of the Supreme Court of the United States, and of the various state courts, and which are forbidden by the constitution. They are intended to punish what are denominated crimes, although mere *belief* that plural marriage and cohabitation with more than one woman is commanded by the Supreme Being cannot be made a crime. If it could the man who merely entertained the *desire* to kill his enemy, or *wished* his adversary ill, could be punished for his thoughts. Burlamaqui, in his Principles of Political Law, lays down this universally accepted maxim of human legislation: "Simple thoughts which do not discover themselves by any external acts prejudicial to society;

for example, the agreeable idea of a bad action, the desire of committing it, the design of it without proceeding to the execution, *et cet.*, all these are not subject to the severity of human punishment, even though it should happen that they are afterwards discovered."

It must be admitted that no state in the Union could prescribe disfranchisement as a punishment for any crime save as a penalty to be imposed after conviction in a court of justice. The decisions of the courts of Pennsylvania, New York, Alabama, Georgia, Kentucky, and various other states, on this point, will not be questioned. Even the author of House Bill 1478 admits this to be the law in respect to the crimes of treason, felony, or bribery, because he provides that persons guilty of such offences shall be *convicted* before they shall be disfranchised. But with strange inconsistency his bill provides that:

"Any person who is a bigamist or polygamist, or who practises unlawful cohabitation, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit or continue in the commission of the crime of unlawful cohabitation, as now defined by law, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages members or devotees, or any other persons, to commit the crime of bigamy, polygamy, or unlawful cohabitation, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association, or otherwise," shall not "be permitted to vote at any election in any of the territories of the United States, or to hold any position or office of honor, trust, or profit within such territory, and more especially shall not be eligible to represent such territory as delegate in the Congress of the United States."

The persons accused of the heinous crimes of treason and felony and of bribery must first be convicted before they can be disqualified, but those who belong to the Mormon Church are to be disfranchised no matter if they are monogamists, and have in point of fact never taught, advised, counseled, or encouraged "any person or persons to become bigamists, polygamists, or to commit or continue in the commission of the crime of unlawful cohabitation, as now defined by law, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage." Mere membership in the Mormon Church is sufficient to disfranchise an otherwise qualified voter. If this does not make a religious test, what does?

How these provisions are to be enforced House Bill No. 1478 does not prescribe. But House Bill No. 6153 with its whereases and enactments provides a test oath. The wonderful preamble of this last bill sets forth that certain things which are not crimes ought to be made crimes, and thereupon enacts that persons who do the things which it is admitted are not crimes shall be punished therefor by disfranchisement and disqualification to vote or hold office. The malignity of the draftsmen of these bills is only equalled by their ignorance and stupidity.

IX.

But it is claimed that the act of March 22, 1882, disfranchises persons who are bigamists or polygamists, or who cohabit unlawfully, and that the Supreme Court of the United States having held this law to be constitutional, therefore like legislation will not be unconstitutional.

The eighth section of the act of March 22, 1882, which imposes disqualification on certain persons is as follows:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such territory or place, or under the United States."

The great difference between this provision of the act of March 22, 1882, and the proposed legislation will be seen at a glance. Disqualification by the first is visited only upon those who are bigamists or polygamists, or who cohabit unlawfully, while the laws enacted by the Idaho legislature, and the legislation you are asked to recommend, disqualifies every member of the Mormon Church. The former inflicts disfranchisement upon those who have offended, and who are offending against laws enacted forbidding certain sexual relations, and the latter proposes to disfranchise those who never have offended any law simply because they *believe* that the certain forbidden relations between the sexes were commanded by God. The one does not undertake to interfere with religious belief, but expressly excepts *belief* and *opinion*,

while the other makes membership in the Mormon Church cause for disqualification. There can be no parallel, no comparison, between the two measures.

It cannot be denied that the eighth section of the act of March 22, 1882, is in direct conflict with the fundamental law as expounded by the Supreme Court of the United States in *Cummings* v. *The State of Missouri*, (4 Wall., 272,) and by the highest courts of Pennsylvania, New York, Alabama, Georgia, and Kentucky in *Huber* v. *Reily*, (3 P. F. Smith, 142;) *Gotcheus* v. *Matheson*, (58 Barbour, 152;) *Barker* v. *The People*, (3 Cowen, 686;) *In the matter of Dorsey*, (7 Porter, 293;) *Campbell* v. *The State of Georgia*, (11 Ga., 353;) *Gaines* v. *Buford*, (1 Dana, 510.)

Judge Black, in speaking of the eighth section of the act of March 22, 1882, says:

"If any man thinks that disfranchisement is not punishment, or that the judgment of an election officer is equivalent to a legal conviction, let him read the opinion of the Supreme Court of the United States in Cummings' case, (4 Wall.,) delivered by Judge Field, or the clear unanswerable exposition of the subject given by Judge Strong, (Huber *v.* Reily, 3 Persifer Smith.) If he does not believe on such authority and such reasoning he would not believe though one rose from the dead."

Judge Field said of the provisions of the constitution of Missouri which disfranchised persons who could not take a prescribed test oath:

"The clauses in question subvert the presumption of innocence and alter the rules of evidence, which heretofore, under the universally recognized principles of common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath into the conscience of the parties."

He held also that the constitution of Missouri violated the fifth amendment of the constitution of the United States, and the court coinciding with him declared that:

"The provision of the federal constitution intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the state is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the constitution intended to guard which may not be effected."

Judge Strong, in *Huber* v. *Reily*, after referring to the fifth and sixth amendments to the constitution of the United States, held that disfranchisement could only be imposed as a penalty and then only after conviction in a court of competent jurisdiction. He says in regard to election officers being made the tribunal to pass upon the guilt or innocence of the accused:

"And I cannot persuade myself that a judge of elections, or a board of election officers constituted under state laws, is such a tribunal. I cannot think they have power to try criminal offenders, still less to adjudge the guilt of an alleged violation of the laws of the United States. A trial before such officers is not due process of law for the punishment of offences according to the meaning of that phrase in the constitution. There are, it is true, many things which they may determine, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization. These things pertain to the ascertainment of a political right. But whether he has been guilty of a criminal offence, and has, as a consequence, forfeited his right, is an inquiry of a different character. Neither our constitution or our law has conferred upon the judges of elections any such judicial functions. They are not sworn to try issues in criminal cases. They have no power to compel the attendance of witnesses, and their judgment, if rendered, would be binding upon no other tribunal."

Judge Murray, of New York, in *Gotcheus* v. *Matheson*, says:

"Citizenship of the United States is an important right and the privileges conferred by it are important privileges, dearly prized by the American people. An act that provides for a forfeiture thereof imposes a penalty and comes within the provisions of the constitution in regard to bills of attainder."

Upon the question of the competency of election officers to pass judgment in such cases the same learned judge says:

"The inspectors of elections are not in a position to adjudicate these matters. They are not authorized to do so. They can determine who are citizens, but they cannot adjudge and declare as an original adjudication that the plaintiff's citizenship has been forfeited by the commission of an offence. They could receive as evidence such an adjudication made by another court and give effect to its provisions by rejecting the vote, and thus deprive the person of the privilege of citizenship; but further than this I do not see that they could go."

In the matter of Dorsey, the supreme court of Alabama went still further, and held that to prescribe an expurgatory oath as a means of ascertaining guilt even when it is to be applied by a court of law was violative of every sound principle of law. Mr. Justice Goldthwaite, whose fame as a jurist is second to none, in his opinion in Dorsey's case, said:

"I have no hesitation in declaring that this act provides a mode of ascertaining and punishing guilt which is not only unwarranted by the constitution, but is also in direct contravention of several of the most important provisions of the declaration of rights, by which the liberties and privileges of the citizens are guarded."

The supreme court of Kentucky in *Gaines* v. *Buford*, where the property rights of citizens were alone involved, held that an act of the legislature which provided for forfeiture of land without a trial was in the nature of a bill of attainder.

The court said—

"That the term should be received in the large sense thus given to it is consonant with the true republican character of our institutions. A condemnatory act of the legislature inflicting upon an individual, or class of individuals, pains and penalties, is as much within the reason of the prohibition as if it inflicted capital punishment. They are both equally hostile to the principles of civil liberty and the spirit of our written constitutions. They are equally engines of tyranny and oppression, and equally unsuited to the government of a free people."

The New York court of appeals in *Barker* v. *The People*, in speaking of the right of the citizen to be eligible to hold office, says:

"As a right flowing from the constitution, it cannot be taken away by any law declaring that a class of men, or even a single person *not convicted* of a public offence, shall be ineligible to public stations; but as a right not expressly secured by the constitution, it may be taken from convicted criminals when the legislature, in their plenary power over crimes, deem such a deprivation a necessary punishment."

X.

The Supreme Court of the United States recognized the hopelessness of answering the logic of the deductions in the cases quoted.

It was aware that, if it admitted that the disfranchisement prescribed in the eighth section of the act of March 22, 1882, was imposed as a punishment, it would be open to two objections, either one of which would be fatal. Accordingly, ignoring the point that it was in effect a bill of pains and penalties directed against a class, the majority of the court merely held that the act "is not open to the objection that it is an *ex post facto* law." It is but necessary to read the disingenuous language of the opinion of the court on this point, and to observe its illogical reasoning to see how it was straining at a gnat while swallowing a camel.

Referring to the eighth section the court says:

"It does not seek in this section, and by the penalty of disfranchisement, to operate as a punishment upon any offence at all. The crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage, and is complete when the relation begins. That of actual cohabitation with more than one woman is defined, and the punishment prescribed in the third section. The disfranchisement operates upon the existing state, and condition of the person, and not upon a past offence. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then actually cohabiting with more than one woman. Disfranchisement is not prescribed as a penalty for being guilty of the crime and offence of bigamy or polygamy, for, as has been said, that offence consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years by section 1044 of the Revised Statutes. Continuing to live in that state afterwards is not an offence, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state without cohabiting with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offence. So that, in respect to those disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime. In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the facts so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in the case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status made necessary by law as a condition of the elective franchise. It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote; and in that event the election officers would be authorized to determine for that occasion, in case of question in any instance, upon the fact of marriage as a continuing status. There is no greater objection, in point of law, to a similar inquiry for the like purpose into the fact of a subsisting and continuing bigamous or polygamous relation, when it is made, as by the statute under consideration, a disqualification to vote." (*Murphy* et al. v. *Ramsey* et al., 114 U. S., 15.)

Observe the inconsistency of the court as well as the inexactness of the language employed to convey its meaning. It says that the law "does not seek in this section, and by the *penalty* of disfranchisement, to operate as a *punishment* upon any *offence* at all." What the writer was trying to say was that "*disfranchisement*" in its imposition in this instance was not as a "*punish-*

ment" for crime, but the habit of using legal phraseology was so strong upon him that he could not escape self-condemnation out of his own mouth. "Penalty," according to Webster, means—

"Penal retribution; punishment for crime or offence; the suffering in person or property which is annexed by law or judicial decision to the commission of a crime, offence, or trespass."

Therefore "*the penalty of disfranchisement*" is *a punishment*, and to argue that it can be inflicted and not "operate as a punishment upon any offence at all" is self-stultifying. But let us analyze the whole paragraph quoted above. The court admits that disfranchisement cannot be inflicted as a penalty by the legislature without a trial. Its attempt to prove that a bigamist is not disfranchised for that offence, or for unlawful cohabitation, is disingenuous. Of course "the crime of bigamy or polygamy" is committed by "entering into a bigamous or polygamous marriage," but "disfranchisement," although it "operates upon the existing state and condition of the person," is none the less "a punishment" for that offence even if prosecution therefor "is barred by section 1044 of the revised statutes." To claim that "disfranchisement is not prescribed as a *penalty* for being guilty of the crime and offence of bigamy or polygamy," but is imposed as a *punishment* for continuing in a bigamous or polygamous state, which is made an offence, is to describe exactly "a penal retribution," which the constitution of the United States declares shall not be inflicted "without due process of law."

To admit that while "one may be living in a bigamous or polygamous state without cohabitation with more than one woman, he is in that sense a bigamist or a polygamist, and yet guilty of no criminal offence," and still insist that "the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime," is simply begging the question. What is the purpose of the inquiry? To ascertain if the person is living in a bigamous or polygamous state without being guilty of a criminal offence? No! The object is to find out whether he is guilty of an offence which subjects him to the penalty of disfranchisement. To do this what is the mode? An expurgatory oath? Yes! Who are to do this? The officers of registration, who, in the language of the New York court of appeals, "are not authorized to do so. They can

determine who are citizens, but they cannot adjudge and declare, as an original adjudication, that the plaintiff's citizenship has been forfeited by the commission of an offence."

Unlawful cohabitation is an offence punishable by fine and imprisonment, nevertheless the Supreme Court says that "the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter, if registered, are required to determine it, is not in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in the case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote." But how far "in the case of every other condition attached to the right of suffrage" are the registration officers, or judges of elections, competent to inquire? "They may determine," says the Supreme Court of Pennsylvania, "many things, such as the age and residence of a person offering to vote, whether he has paid taxes, and whether, if born an alien, he has a certificate of naturalization, * * * but whether he has been guilty of a criminal offence and has, as a consequence, forfeited his right, is an inquiry of a different character." The utmost extent to which they can go, says the Supreme Court of New York, is to receive as evidence the ajudication by a court of competent jurisdiction "that the plaintiff's citizenship has been forfeited by the commission of an offence."

And the reasons for this are threefold. First, because both in the United States and in England it has invariably been held that an election officer is "neither a judge nor anything like a judge." Second, because "citizenship of the United States is an important right, and the privileges conferred by it are important privileges, dearly prized by the American people. An act that provides for a forfeiture thereof imposes a penalty, and comes within the provisions of the constitution in regard to bills of attainder." Third, because "if this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the constitution intended to guard which may not be effected."

Having wabbled into this untenable position it is not surprising that the court should assert that "it would be quite competent

for the sovereign power to declare that no one but a married person shall be entitled to vote." It might with equal accuracy have said that the sovereign power could prescribe the height, in feet and inches, of the persons entitled to vote, as well as the color and the cut of their hair. It would be well for the judges of the Supreme Court to revert occasionally to the enunciations of the ancient worthies, whose seats they occupy, upon the subject of the limit of legislative power.

XI.

But whether you are inclined to hold fast to the great fundamental principles of free republican institutions with Hamilton, Marshall, Washington, Chase, and all the great jurists and statesmen of the past, or go astray with those who seem determined to make the law fit certain cases on the theory that the end justifies the means, one thing is certain, you cannot disqualify persons because they *think* or *believe* in a way that you may not approve. You cannot disfranchise those who are members of a particular church organization because part of the religious faith of that body ecclesiastical is not according to your notions. The plain letter of the constitution stands in the way and you cannot evade it by indirect means.

Upon the right of thinking and believing let me commend a case in 41 Georgia, 183, *Maxey* v. *Bell*. Bell, a universalist, was guardian of certain minor children. Maxey moved to have him set aside because he was an infidel. The opinion of the court is brief:

"It is a little extraordinary," it says, "that the spirit of intolerance should need such precise restraints to keep it within bounds. It has for years been the settled law of this state that men shall not be molested for their religious opinions.

"In Georgia a man may *think* as he pleases upon any subject, religious, philosophical, or political, and is not for that under any civil or political disability."

It is respectfully submitted that it is the bounden duty of this committee not only to report adversely upon House Bills 1478 and 6153, but to recommend that the legislation enacted by the legislative assembly of Idaho should be disapproved by Congress.

The condition of the people of Bear Lake county, Idaho, must appeal to your consciences. Their petition sets forth the great injustice which has been done them. The petitioners have in no-wise offended, and as American citizens they are entitled to the exercise of all the rights and privileges of citizenship.

A. M. GIBSON,
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